Filed 2/3/03 P. v. Covey CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW PAUL COVEY,

Defendant and Appellant.
_____/

H023172
(Santa Clara County
Super.Ct.No. CC087135)

Defendant Matthew Paul Covey was charged by information with first degree burglary (Pen. Code, §§ 459-460, subd. (a)),[1] possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), concealing or withholding stolen property (§ 496, subd. (a)), and attempted first degree burglary (§ 664). The information further alleged a prior conviction that qualified as both a serious felony (§ 667, subd. (a)) and a strike (§ 1170.12), as well as a prior prison term. (§ 667.5, subd. (b).) A jury found defendant guilty of the new offenses, and defendant admitted the three prior allegations. The trial court sentenced defendant to 14 years, four months in state prison.

On appeal defendant argues (1) the trial court erroneously admitted evidence of a prior, uncharged crime; (2) trial counsel provided ineffective assistance by failing to object to admission of defendant's statements made after inadequate *Miranda*[2] warnings;

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1 Further unspecified code references in this paragraph are to the Penal Code.

2 *Miranda v. Arizona* (1966) 384 U.S. 436.

(3) the prosecutor committed *Griffin*[3] error; (4) trial counsel provided ineffective assistance by failing to object to admission of evidence of defendant's poverty; (5) the trial court erred by giving CALJIC No. 2.15; (6) the trial court erred by giving CALJIC No. 14.66; (7) the trial court erred by giving CALJIC No. 17.41.1; and (8) the cumulative effect of the errors requires reversal. Defendant has also filed a petition for writ of habeas corpus, which we previously ordered considered with the appeal. We have disposed of the habeas petition by separate order filed this day. (See Cal. Rules of Court, rule 24(b)(4).)

FACTS

In late September 2000, defendant was without a home or a car. He had previously lived off and on in Santa Clara around the corner from Judy Hayes, and he asked Judy[4] if he could sleep in an inoperable van parked in her driveway. He ended up sleeping there about 10 days, until September 27.

During this time, defendant would sometimes come into the Hayes home to use the telephone or to have some coffee. When he was inside the home he always sat on a chair and Judy always sat on the couch with her purse on the floor. On September 20, defendant was sitting on the chair when Judy went into the garage to do some laundry. When she came back defendant had moved from the chair to the couch. Her purse was open and her keys were on the top. She put away some clothes and when she came back into the room again defendant had moved back to the chair. The next day Judy discovered she had no money in her purse despite the fact that she knew she had had $40 to $50 dollars in it the day before.

Judy and her husband left for a convention on September 27. The day before, Judy told defendant that she would be locking up the van and that he would need to find

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[3] *Griffin v. California* (1965) 380 U.S. 609.

[4] Because some witnesses were family members with the same last name, we will refer to the family members by their first names.

someplace else to stay because her children would be at home with her daughter-in-law, Karrie Gutierrez. When Judy left, she left Karrie her house keys. Judy did not give defendant permission to enter her home in her absence. She told Karrie that she had locked the van and that defendant was not to be on the premises while she was gone. Judy told her children the same thing.

Karrie went to the Hayes home on September 27 about 5 p.m., taking with her a bag and her purse. In her purse were a wallet, a checkbook, two ATM cards, a credit card, a cell phone, and an auto repair receipt. Judy had left Karrie the key to a van and Karrie used that van to take some of the children to an open house, taking her purse with her. She was gone about two hours. After she returned about 8 p.m., Karrie put Judy's keys in her purse and put the purse down next to the couch. She did not take her purse with her when she then used her own car to give a ride home to a child's friend. She was gone about 20 minutes. The next morning when Karrie looked for her purse it was gone. She reported the loss of her purse and its contents to the police later that day. She called her cell phone number several times on September 28, and on one occasion somebody answered but did not say anything. When she got her cell phone bill, it included charges for several calls made after 7 p.m. on September 27 that she did not make.

The back door at the Hayes home is a sliding glass door covered with a curtain. It is kept locked. Judy had never known defendant to use her back door. At about 9:30 a.m. on September 29, Judy's 16-year-old son James was in the kitchen sitting at the computer desk. He was alone in the house and as he was about to get up, he saw a shadow move across the back door curtain. The shadow moved to the door handle and then James heard the sound of metal touching metal. After a brief pause, James pulled back the curtain and saw defendant at the door. Defendant jumped back as if he had been startled, and James opened the door. When James asked defendant what he wanted, defendant asked to use the telephone. James allowed defendant to use the telephone, which took about 10 minutes, and then defendant left. James's sister called him and he

told her what had happened. She called the police and James talked to them about the incident.

Rodney Nicholson was outside his home in Santa Clara about 5 p.m. on September 29 when he noticed somebody squatting in the bushes across the street. The person had what appeared to be a wallet in his hands, and was pulling credit cards out of the wallet. Nicholson called the police department on his cell phone and reported what he had seen. After a while the person emerged from the bushes wearing jeans and no shirt but carrying a jacket. Nicholson watched the person walk away and followed him a short distance. Santa Clara police officers David Rodriguez, Michael Davis, and Amy Jackson responded to the radio dispatch of a suspicious person. Nicholson pointed out defendant to the officers when they arrived.

Defendant was wearing jeans and no shirt, but was carrying a shirt and a jacket. Defendant told the officers that his family lived in the neighborhood and that he had moved out about a month before. He said that he was staying in Hayward but had come to Santa Clara to pick up his and his brother's mail at the post office. He intended to place his brother's mail on his brother's car, but indicated that he did not know specifically where it was, only that it was somewhere in the area. He said that he had been kneeling in some bushes looking at the mail. Defendant asked to be able to put on his shirt and jacket, and did so.

The officers noticed that defendant had a cell phone in his possession and Jackson asked him if it was his. When he replied that it was not, Jackson asked him whom it belonged to. Defendant replied that he had found it in the nearby park and indicated his intention to turn it in to the police. Jackson asked defendant if she could take custody of the cell phone, and defendant turned it over to her. Rodriquez asked defendant if he would consent to a search of his person for officer safety purposes. Defendant consented and raised both hands above his head. A small Ziploc baggie containing a peach-colored

residue fell from defendant's right sleeve. The powder later tested positive for methamphetamine.

Jackson handcuffed defendant and Rodriquez transported defendant to a temporary holding facility. Rodriquez searched defendant and advised defendant of his *Miranda* rights. Rodriguez recovered from defendant's front pant's pocket a five-inch glass pipe commonly used to smoke methamphetamine. Karrie's auto repair receipt and ATM card were also recovered from defendant, but no money or mail addressed to either defendant or his brother was recovered. Defendant told Jackson that he found the ATM card and receipt, along with the cell phone, at a bus stop in Sunnyvale. He indicated that he had originally said that he had found the cell phone in the park because he was nervous about being contacted by the police. Defendant admitted knowing he had the methamphetamine. A blood test taken from defendant tested positive for the presence of methamphetamine.

The police recovered Karrie's purse from the area Nicholson had reported originally seeing defendant. The police later determined that a number of calls had been placed from Karrie's cell phone to acquaintances of defendant between the evening of September 27 and September 29.

DISCUSSION

Uncharged offense evidence

During Judy's testimony, the trial court held an Evidence Code 402[5] hearing to determine the admissibility of testimony that defendant stole $40 to $50 from Judy's purse a few days before the offenses charged in this case. The prosecutor proffered the evidence under section 1101, subdivision (b), on the issues of identity, intent, and a common plan or scheme. The court ruled that the evidence was admissible. The court instructed the jury in part after the close of evidence that, "Evidence has been introduced

[5] Further unspecified code sections are to the Evidence Code.

for the purpose of showing that the defendant committed a crime other than that for which he is on trial, that is, taking the forty dollars from [Judy's] purse. [¶] Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. [¶] It may be considered by you only for the limited purpose of determining if it tends to prove the following; [¶] A characteristic method, plan or scheme in the commission of the criminal acts similar to the method, plan or scheme used in the commission of the offense used in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, to which the defendant is accused." Defendant argues that the evidence of the uncharged offense was inadmissible to show either identity or intent, and that it was simply prejudicial propensity evidence.

"Evidence of an accused's character or trait of his character is not admissible to prove he had a propensity to commit the crime with which he is presently charged nor is it admissible to prove he acted in conformity with that trait on a particular occasion." (*People v. Bergshneider* (1989) 211 Cal.App.3d 144, 160.) Section 1101, subdivision (a) provides in part: "Except as provided in this section . . . evidence of a person's character or a trait of his or her character (. . . in the form of . . . evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1101, subdivision (b), an exception to this general rule of inadmissibility, provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime . . . or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." " 'Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue,

such as motive, intent, preparation or identity.' [Citations.]" (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1020.)

To be relevant, the evidence must tend to prove either an ultimate fact or an intermediate fact from which the ultimate fact may be presumed or inferred. (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) To be relevant on the issue of identity, the uncharged offense must be highly similar to the charged offenses. (*People v. Kipp* (1998) 18 Cal.4th 349, 369-370; *People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) A lesser degree of similarity is required to establish relevance on the issue of common design or plan. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) "For this purpose, 'the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.' [Citation.]" (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371.) "The least degree of similarity is required to establish relevance on the issue of intent. (*People v. Ewoldt*, *supra*, 7 Cal.4th 380, 402.) For this purpose, the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant " 'probably harbor[ed] the same intent in each instance.' [Citations.]" ' (*Ibid*.)" (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371.)

If relevant, the probative value of the prior bad act must be weighed against the danger "of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) Admissibility of such evidence is committed to the sound discretion of the trial judge, whose discretionary decision will not be reversed on appeal absent clear abuse of discretion. (*People v. DeRango* (1981) 115 Cal.App.3d 583, 590; see also, *People v. Kipp, supra,* 18 Cal.4th at p. 369.)

Defendant admits that the "crucial and hotly disputed issue [at trial] was that of [defendant's] mental state at the time he entered the Hayes residence on September 27" and attempted to enter the residence again on September 29. Defendant "could well have entered the Hayes residence without intent to steal property, and then developed such

intent after he was in the house." Defendant could also have attempted to enter the residence on September 29 simply to use the telephone, as he indicated to James upon his discovery that day. The testimony about the uncharged theft was thus highly probative of the prosecution's claim that defendant had the intent to commit theft when he entered the home on September 27 and attempted to enter again on September 29. As the testimony had significant probative value and there is no apparent prejudice (see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138 [in applying section 352, prejudicial is not synonymous with damaging]), we cannot say that the trial court abused its discretion in admitting the testimony.

Miranda violation

Prior to trial, the court held a section 402 hearing "regarding the voluntariness of any statements made by the defendant that the District Attorney intends to present in his case in chief." During the hearing, Rodriguez testified as to the *Miranda* warnings that he gave defendant prior to defendant's questioning. "I advised him that he had the right to remain silent. I advised him that anything he said could and would be used against him in a court of law. I advised him that he had the right to speak to an attorney, to have an attorney before him during questioning. And I advise[d] him if he cannot afford one, one would be provided him free of charge." After Rodriquez, Davis, and Jackson testified at the hearing, trial counsel sought to suppress only defendant's pre-*Miranda* statements. Defendant now contends that the *Miranda* warnings given were inadequate, as they did not inform defendant of his right to consult an attorney prior to questioning, and that trial counsel was ineffective for failing to object to the admission of statements defendant made after being given the inadequate warnings.

To obtain reversal due to ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and then demonstrate a "reasonable probability" that but for counsel's unprofessional errors, the result of the proceedings would have been

different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692; *People v. Lucas* (1995) 12 Cal.4th 415, 436; *People v. Pope* (1979) 23 Cal.3d 412, 423-425.) When the claim of ineffective assistance of counsel is made on direct appeal, the claim will be sustained "only if the record on appeal affirmatively discloses that counsel had no rational purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581; *People v. Zapien* (1993) 4 Cal.4th 929, 980.)

"[W]hen an individual is taken into custody . . . and is subjected to questioning," "[p]rocedural safeguards must be employed to protect the privilege [against self-incrimination]." (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 478-479.) "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of any attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Id*. at p. 479.) The United States Supreme Court "has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." (*California v. Prysock* (1981) 453 U.S. 355, 359 (*Prysock*).) "Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." (*Ibid*.) "Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' *Prysock*, *supra*, at 361." (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203.)

It is clear that the officer in this case fully conveyed to defendant his rights as required by *Miranda*. Defendant was told of his right to speak to an attorney and to have an attorney present during interrogation, and his right to have an attorney appointed at no cost if he could not afford one. These warnings conveyed to defendant his right to have an attorney appointed if he could not afford one prior to and during interrogation. (See, *Prysock*, *supra*, 453 U.S. at p. 361.) This is not a case in which the defendant was not

informed of his right to the presence of an attorney during questioning or in which the offer of an appointed attorney was associated with a future time in court. Because the warnings were not inadequate, trial counsel was not ineffective in failing to seek to suppress defendant's post-arrest statements.

Griffin error

In closing, the prosecutor argued in part as follows. "Now, in reviewing this entire area of circumstantial evidence many times lawyers will put emphasis on the first word, circumstantial, and not a lot of emphasis on the second term which is evidence because what you are applying the standard to is evidence that was received in the course of the trial and not extend that to speculating or conjecturing about things that were not testified to. [¶] In that regard, [defense counsel], on behalf of his client, argued to you in terms of well, perhaps. Perhaps Mr. Covey stuck his head in and looked around, and entered innocently enough and then spotted something to steal. [¶] Perhaps Mr. Covey was going to go in and use the bathroom. [¶] Perhaps Mr. Covey was going to enter into the house and use the telephone and only after those perhapses did he then form an intent to steal. [¶] The question is: *Where do you have any evidence of any of those perhapses?* [¶] *Where did you have a single word of testimony* or a single item of evidence to even suggest such that you might conjecture or speculate that Mr. Covey did one or more of those things?" Defendant argues that because defendant did not testify, the italicized portion of the prosecutor's argument indicated to the jury that his silence was evidence of his guilt in violation of *Griffin v. California, supra,* 380 U.S. 609, 615.

" '*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand. The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.' [Citation.]" (*People v. Hovey* (1988) 44 Cal.3d 543, 572, see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1051.) It is true that "a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is

uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) But this does not mean that a comment on the absence of testimony is equivalent to a comment on defendant's failure to testify. By couching the argument in general terms ("Where do you have any evidence of those perhapses?") the prosecutor in this case made it clear that he was remarking on the general state of the evidence, not on defendant's failure to testify in his own behalf. (See *People v. Morris* (1988) 46 Cal.3d 1, 36.)

Defendant argues that only he could testify on the crucial issue of intent. Viewed in context, the prosecutor's comments were "a permissible reference to the state of the evidence and the fact that intent may be difficult to prove directly. The prosecutor did not argue that the evidence of defendant's intent . . . was uncontradicted by *defendant*." (*People v. Mitcham*, *supra*, 1 Cal.4th 1027, 1051, emphasis added; see also *People v. Bradford*, *supra*, 15 Cal.4th at p. 1340 [no *Griffin* error when the prosecutor did not allude to the lack of refutation or denial by the defendant, but rather to the lack of evidence].) "In any event, 'indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error. [Citations.]' [Citation.]" (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1340.) There was no suggestion by the prosecutor in this case that the jury should draw an adverse inference from defendant's decision not to testify. The prosecutor's remarks did not amount to prejudicial *Griffin* error.

Evidence of poverty

Judy testified that at the time of the offenses defendant was without a home or a car.[6] An officer testified that when defendant was booked into custody, he had no money in his possession. Trial counsel did not object to any of this testimony. During closing argument, counsel objected to the prosecutor's comments on the inferences that could be drawn from defendant's possession of methamphetamine but no money, and moved for a mistrial, but the court overruled the objection and denied the motion for mistrial. Defendant now argues that trial counsel provided ineffective assistance by failing to object to evidence of his poverty.

"Evidence of a defendant's poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft, because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and the probative value of such evidence is considered outweighed by the risk of prejudice. [Citations.] Under certain circumstances, however, evidence of poverty or indebtedness may be relevant and admissible for limited purposes, such as to refute a defendant's claim that he did not commit the robbery because he did not need the money." (*People v. Wilson* (1992) 3 Cal.4th 926, 939.) Evidence of defendant's lack of home or car was not admissible. The evidence was relevant, as respondent argues, but any probative value that the evidence may have had was outweighed by the risk of undue prejudice to defendant. Had trial counsel made a section 352 objection to this evidence, it is reasonably probable that the trial court would have sustained it.

" 'Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object

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[6] Judy testified at the section 402 hearing that defendant's car had recently been stolen. Defendant reported to the probation officer that he had been living in Hayward until his car was stolen with all his belongings. It was at that time that he returned to Santa Clara and contacted Judy.

seldom establishes counsel's incompetence.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 215.) In this case, defendant had been a friend of the Hayes family for some time but was no longer living around the corner from them. He had been living in Hayward, yet was in the area of the Hayes home for a period of about 10 days prior to September 27. Judy had allowed him to sleep in an inoperable van parked in her driveway, and had allowed him inside the home to have coffee and use the telephone on a number of occasions during that time. James was willing to let defendant come in the home to use the telephone after finding him at his backdoor under suspicious circumstances on September 29, even after Judy told James that defendant was not to be allowed in. Defense counsel may have decided not to object to the testimony about defendant's lack of home or car because it explained defendant's accepted presence in the area without highlighting his poverty and making it more significant than it was. Such a determination would have been a reasonable tactical decision.

By contrast, it is not reasonably probable that the trial court would have sustained an objection to the officer's testimony that defendant did not have any money in his possession when he was booked into custody. This is not evidence of poverty; while poverty is a reasonable inference that can be drawn from testimony that a person has no home or car, it is not a reasonable inference that can be drawn from testimony that a person has no money at a specific point in time. Moreover, the testimony about defendant's lack of cash was highly relevant. Defendant had some contents of the stolen wallet in his possession as well as methamphetamine. As the trial court found, "one could reasonably conclude that the money from the wallet that was not recovered was used [to purchase the methamphetamine], and it's circumstantial evidence to show the identity of the person who committed the burglary as well." As it is not reasonably probable that the trial court would have sustained an objection to this testimony, counsel cannot be faulted for failing to make such an objection.

CALJIC No. 2.15

Defendant contends that the trial court violated his due process rights by giving CALJIC No. 2.15. This instruction stated in part: "If you find that the defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant Matthew Covey is guilty of the crime of first degree residential burglary as stated in count one. Before guilt might be inferred, there must be corroborating evidence tending to prove the defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt."

Defendant contends that the instruction diluted the reasonable doubt standard by inviting the jury to convict him with evidence that might not satisfy that standard. This court has previously stated, however, that "CALJIC No. 2.15 has repeatedly withstood challenges on the grounds that it lessens the burden of proof or otherwise denies a defendant due process of law." (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1173.) In *People v. Anderson* (1989) 210 Cal.App.3d 414, 426-427, for example, the defendant, appealing from a conviction of receiving stolen property, raised the same due process argument. The Fourth District, Division One, explained that the inference of guilt created by the instruction is permissive only. "Where an inference of guilt is merely permissive (rather than mandatory), the prosecution's use of the inference comports with due process requirements unless, under the facts of the case, there is no rational way for the jury to make the logical connection which the inference permits. [Citation; fn. omitted.] That is, a permissive inference empowers the jury to credit or reject the inference based on its evaluation of the evidence, and therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt." (210 Cal.App.3d at p. 427.)

Furthermore, as the Supreme Court has observed in cases involving robbery and burglary, "instructions are not considered in isolation. . . . The jury was advised that the instructions were to be considered as a whole and each in the light of all of the others. It

was also instructed on all of the required elements of burglary and robbery and was expressly told that in order to prove these crimes, each of the elements must be proved. We see no possibility that giving the jury the additional admonition that it could not rely solely on evidence that defendant possessed recently stolen property would be understood by the jury as suggesting that it need not find all of the statutory elements of burglary and robbery had been proven beyond a reasonable doubt. Indeed, where identity of a perpetrator is in dispute or sought to be proved by circumstantial evidence, CALJIC No. 2.15 protects the defendant from unwarranted inferences of guilt based solely on possession of property stolen in the charged offense." (*People v. Holt* (1997) 15 Cal.4th 619, 677; accord *People v. Smithey* (1999) 20 Cal.4th 936, 977-979.) Accordingly, "[c]onsidering the instructions in their entirety, as we must [citation], we find no possibility that instructing the jurors pursuant to CALJIC No. 2.15 suggested that they need not find that all the statutory elements of burglary and robbery had been proven beyond a reasonable doubt . . . ." (*People v. Smithey, supra,* 20 Cal.4th at pp. 978-979.) For these reasons, we conclude in the present case that the trial court did not err by giving CALJIC No. 2.15.

CALJIC No. 14.66

Defendant contends that the trial court violated his due process rights by instructing the jury with CALJIC No. 14.66. This instruction stated in part: "In the crime of receiving stolen property, there must exist a union [of] joint operation [of] act [or] conduct [and general] criminal intent. [¶] There is no general criminal intent if the defendant buys or receives stolen property, knowing it to be stolen with the intent to return the property to its owner or deliver it to law enforcement officers. . . . The presence of an innocent intent is a defense to the charge of buying or receiving stolen property, and *the burden of raising reasonable doubt as to the existence of criminal intent is upon the defendant*." (Italics added.)

Defendant contends that the italicized portion of the instruction violates his due process rights, as the defendant in a criminal case bears no burden of proof whatsoever. He argues that, "[t]hese principles flow from the presumption of innocence, the defendant's right to remain silent, and the prosecution's overarching responsibility to prove beyond a reasonable doubt each element of the charged crimes. (See *In re Winship* [(1970)] 397 U.S. [358,] 364; *Jackson v. Virginia* [(1979)] 433 U.S. [307,] 316; *Sullivan v. Louisiana* [(1993)] 508 U.S. [275,] 277-278.)"

"The People, in proving the commission of the crime [of possession of stolen property], have the primary obligation to establish, by substantial evidence (1) that the particular property was stolen, (2) that the accused received, concealed or withheld it from the owner thereof, and (3) that the accused knew the property was stolen [citations]. [¶] The burden of proving each of these elements, whether by direct or circumstantial evidence, is upon the district attorney. The burden of proving innocent intent is upon a defendant." (*People v. Dishman* (1982) 128 Cal.App.3d 717, 721 (*Dishman*); accord, *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 [under Penal Code section 496, "the defendant is obligated to prove that his intent was innocent."].) The court in *Dishman* explained the reason for this rule as follows: "In putting forth such defense, the critical factor is the intent of the receiver at the moment that he receives the stolen property. In other words, if a prima facie case is made out by the state by showing that the property was stolen, that it was received, concealed, or withheld from the owner and that the accused knew the property was stolen, he is subject to conviction, so long as the jury finds that he had the requisite general criminal intent. A defense that although all other elements were present, the defendant did not have any criminal intent but had, from the moment that he received the stolen property, intended to return it to the rightful owner, if proven and accepted by the jury, will absolve him of guilt [citation]." (128 Cal.App.3d at pp. 721-722; accord, *People v. Osborne* (1978) 77 Cal.App.3d 472, 476 [under Penal

Code section 496, "the absence of any . . . guilty intent is a defense which, if established, disproves the charge"].)

CALJIC No. 14.66 embodies the principles enunciated in *People v. Osborne*, *supra*, *People v. Wielograf*, *supra*, and *Dishman*, *supra*. (Com. to CALJIC No. 14.66 (6th ed. 1966) p. 247.) The court did not err or violate defendant's due process rights by giving CALJIC No. 14.66.

CALJIC No. 17.41.1

Defendant contends that the court erred by instructing the jury with CALJIC No. 17.41.1 because it impedes free and open jury deliberations and discourages the historically accepted practice of jury nullification. That instruction stated: "The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate, or expresses an intention to disregard the law or to decide the case based on penalties or punishment or . . . any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

The California Supreme Court in *People v. Engelman* (2002) 28 Cal.4th 436 disapproved the use of CALJIC No. 17.41.1 but found that, under the facts of that case, the giving of this instruction "did not constitute constitutional error." (*Id*. at p. 444.) We also find no constitutional error.

Nothing in the record supports an allegation of jury misconduct or other problem with the jury deliberations related to the challenged instruction. The instructions in this case, like in *Engelman*, conveyed the necessity for each juror to exercise his or her impartial, independent judgment. (Cf. *People v. Engelman*, *supra*, 28 Cal.4th at pp. 444-445.)

As to any argument that CALJIC No. 17.41.1 infringes upon defendant's constitutional right to jury nullification, it is without merit in light of *People v. Williams* (2001) 25 Cal.4th 441, 449-463. The court in *Williams* declared: "Jury nullification is

contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law." (*Id*. at p. 463.) The court explained that, although the possibility of jury nullification exists because of certain procedural aspects of our criminal justice system, a defendant does not have a constitutional right to that possibility. (*Id*. at pp. 449-451.)

Cumulative error

Lastly, defendant argues that the cumulative effect of the errors in this case deprived him of a fundamentally fair trial and due process of law. As we have found only one possible error, and have found it to be nonprejudicial, we see no reason to further address this claim.

DISPOSITION

The judgment is affirmed.

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Elia, J.

WE CONCUR:

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Rushing, P. J.

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Premo, J.